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OUR FORM OF GOVERNMENT

AND

THE PROBLEMS OF THE FUTURE.

BY A. E. KROEGER.

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THE PROBLEMS OF THE FUTURE.

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To point out the fundamental principle of law and government signifies, to show that self-consciousness is impossible unless a certain relation is established between a multiplicity of human individuals, which relation is called that of law, or the legal relation.

It is the business of a Science of Rights to furnish the exhaustive proof of this proposition. To attempt it within so limited a space as that of this treatise would be absurd, and hence we can at the utmost recapitulate the chief points of that proof.

The Science of Knowledge in general establishes the proof that the conception of self-consciousness involves the conception of a free causality. The Science of Rights accepts this proof as a fact from the Science of Knowledge in general, and next proceeds to show that such free causality involves the conception of a sensuous world, through which it may become possible at all, and of a multiplicity of individuals, through whom it may become an object of consciousness. In showing that the consciousness of free activity, or self-determination, can arise only if one of a multiplicity of rational beings comprehends an influence directed upon it to be that of a similar free activity in another rational being, the Science of Law or of Rights establishes the universal validity of its deductions.

For this is then clear: A rational being would not be possible, except as placed in relation to another rational being, which relation compelled the former to comprehend the latter as a free, self-determined being. It is only through thus comprehending the other as free and self-determined, that the former becomes conscious of its own freedom and rationality, or, in other words, that it becomes a free and rational being. It is only through this relation that rationality and self-determination becomes possible. No legal relation, no rational beings.

Having thus shown up the universal validity of its fundamental principle, the Science of Rights next proceeds to establish the problem which that principle involves, and which is this:

How can a multiplicity of free and self-determined individuals exist together? If each rational being, in order to be such, must comprehend the others as equally free, how can it retain its own freedom?

Our own Declaration of Independence expresses this absolute freedom or self-determination of each rational being, as follows:

"We hold these truths to be self-evi-

dent: that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that amongst these are life, liberty, and the pursuit of happiness."

The word "amongst" might have been left out, for it is self-evident that only these three original or natural rights are possible: a right to life, because a rational being could not become conscious of causality upon the sensuous world unless it posited itself as existing beyond the *act* of such causality in order to perceive its realization; a right to freedom, because the conception of a rational being involves the conception of self-determination; and a right to the pursuit of happiness—which is used in the Declaration of Independence as equivalent to a right of property—because every free being, in order to have causality upon the sensuous world, must make a part of that world subject to its purposes, or must make it its property.

But if each rational being has these rights by virtue of its rationality, and if each must comprehend the other as entitled to them in order to become itself a rational being, how is rationality itself possible? Evidently there must be a conception, by virtue of which each rational being limits its own original rights by the conception of those of others. But how can such a conception be realized? Granted, that each individual recognizes this conception as the only possible condition of rationality, how shall the one be sure that the other will always recognize it thus in his acts, or, in other words, will always treat him as a rational being? Clearly the mere conception must become an external law, an agreement of each with all others to respect their self-determination. Without such an agreement they cannot securely live together, and since they must live together; in order to be free beings, each one has the right to compel each other one to enter such an agreement with him. Whoever should refuse to enter it, would thereby declare himself to be *not* a rational being. It is, indeed, only after each has obtained the agreement of all others to respect his rights, that he has *rights.* These rights, as we have seen, are three in number: rights to life, liberty, and property—the latter word signifying free causality upon a limited sphere of the sensuous world.

II.

A right to life is generally understood to signify right to the body as a whole, the body being in the sensuous world the rational being itself. Each individual must retain exclusive determination of his own body. No one has ever the right to compel a physical action not determined through the will. In other words, complete moral freedom is guaranteed to each individual in guaranteeing to him this right to life. To secure it he enters the agreement with all others, and he has no other purpose than to secure it in entering that agreement. If it is taken away from him—unless he commits a crime, and thus loses all his rights, and ceases to be a rational being—the agreement is annulled. By commanding, for instance, forcible military duty (conscription), a government annuls itself, because it annuls the only reason for its establishment—to-wit, the self-determination of each individual.

The right to life involves also the continuance of that life—a right which is specified in law books as a right to lawful and uninterrupted enjoyment of life, of the body, of health, and of a good name. Even the right to employment is included, as when Blackstone says: "The law not only regards life and members, and protects every man in the enjoyment of them, but also furnishes him with everything necessary for their support. For there is no man so indigent or wretched but he *may demand* a supply sufficient for all the necessities of life *from the more opulent* part of the community, by means of the several statutes for the relief of the poor."

The right to freedom is usually held to signify freedom of bodily movement, a right esteemed even higher than that of life. Hence the great importance attached at all times to the *habeas corpus* act, until recently, that sacred respect for it has unhappily been lessened by its temporary repeal. It is folly to urge that the "condition of the country" may justify such

violations of the law. No individual becomes a citizen of a State to have his rights guaranteed to him when there is no danger, but to have them secured when danger threatens. The *habeas corpus* act was not so much intended for times of peace, for no one would think of violating its principles in times of peace; it was particularly intended for times of war, of rebellion, of great public danger; and all provisions in the Constitution, and in our statute books, are only intended for cases of violation of the law; for law is created only to negate itself, to make itself superfluous. Is it supposable that the people would make a law to bring before a court any one "who is detained with or *without* due process of law, unless for treason or felony, plainly and specially expressed in the warrant," &c., if that law was intended to be operative only in times when it was least likely to be needed?

The right to freedom also involves the right to emigration, another right which was unlawfully taken away recently. This right signifies that each citizen of a commonwealth may at any time declare his retirement from the State by emigrating. The right is grounded upon the right of moral freedom. Changes may occur in the laws of a State, which render it impossible for a man who respects his freedom of conscience to remain. The only escape open to him is to leave the State, wherein he can no longer maintain his dignity as a man, and no power in the world has the right to enslave him, by compelling him to remain.

Originally each man has the same right of property to all the sensuous world. By entering an agreement with others he limits his right to a certain part of the world, and having this part recognized by the others, recognizes in his turn their appropriated part. If he does not appropriate any landed estates, he may appropriate a certain branch of business, or practice of a profession. His sphere of causality, no matter what that sphere is, is his property, as soon as it is recognized by his fellow-citizens.

The recognition of these three rights is contained, for our whole Republic, in the Declaration of Independence, as we have shown, which is thus the Bill of Rights of our people. How clearly the true nature of the Declaration of Independence, as such an original Bill of Rights of our form of government, has been apprehended by others, let the following sentence from the oration of John Quincy Adams bear witness:

"The Declaration of Independence was a *social compact*, by *which the whole people covenanted with each citizen* of the United Colonies, *and each citizen with the whole people*, that the United Colonies were, and of right ought to be, free and independent States." Let us add: "And that all men are born equal, and are endowed by their Creator with certain unalienable rights, which are life, liberty, and the pursuit of happiness."

III.

But an agreement of each with all, to respect each other's freedom, affords no security that the rights of each will be respected; on the contrary, it is based on the very supposition that each will *not* respect the rights of the other. Hence the necessity of a power to compel each person to respect that agreement; and hence, also, the necessity of entrusting this power to a third party. For if each were to have the power of compelling redress of his own grievances, the insecurity would be just as great as if no agreement at all had been made.

The Declaration of Independence gives expression to this in the following clause: "That to secure these rights governments are instituted amongst men, deriving their just powers from the consent of the governed; that whenever any form of government becomes destructive of these ends, it is the right of the people to alter or abolish it, and to institute a new government."

This statement is as wonderfully comprehensive as that respecting the original rights of men, and indeed in these two statements of the Declaration of Independence is contained the whole Science of Rights. This statement involves the following two:

1. A government must be established, in order to secure the rights of men.

2. The government must be held responsible to the people.

In other words: The people cannot retain the power of deciding their own law cases; that power must be transferred to a third party; but at the same time the people must retain the power to prevent that third party from ever deciding against the law. The people must establish a government, and at the same time establish checks to prevent that government from transcending its powers.

In showing up the necessity of these two conditions for the realization of the conception of rights, the Science of Rights furnishes the *a priori* justification of the American form of government, as one of limited powers, and of checks and balances.

Ancient democracy did not recognize this principle of limited powers. In Athens the people retained the power of judging their own cases in their own hands, and hence that democracy was only despotism. Any form of government is despotic which places the executive power beyond the reach of responsibility. A sovereign President is a despot; and a sovereign Congress is a despot. Despotism ceases only where sovereignty ceases. Even the people cannot be sovereign, for they cannot be held responsible. Athenian democracy was therefore thoroughly despotic, there being no appeal from decisions of the people, who were both judge and interested party in every trial. To be rational, a form of government must return into itself, and this is only done in a government which prescribes itself the law, not to violate the law.

How both the executive power of a government and the check upon that power is to be actualized in a commonwealth, is a question for the statesman to settle; *a priori* arguments do not extend so far. It is an infinite problem, which can be realized always more and more perfectly, yet never fully. The art of inventing a machinery, which will best accomplish its realization—of inventing a contrivance, *by means of which governments shall always have unlimited power to carry out the law, and yet shall at the same time be utterly impotent to transgress or neglect the law*—this most difficult of all arts is the art of politics. The Spartans invented the *Ephores* as such a supervising power; other countries have established the division of power, &c. We, in our country, have, moreover, superadded to it a complicated State confederation. But before we examine the realization of this conception in our commonwealth more closely, let us take a short review of the history of that realization.

IV.

The history of the first settlement on the North American continent is known to all. Colonies were founded, and civil governments instituted, bearing more or less the impress of liberal ideas, as these ideas had been developed in England, and also of the republican conceptions obtained from the Netherlands. A very distinct character was imprinted upon the New England settlements. The Puritans, who settled them, did not so much desire to build up a republican form of government as a theocracy, a new kingdom of the Jews. Having that peculiar conviction of the universal validity of their individual views, which we have before characterized, they, of course, considered it their saintly duty to persecute all who did not think like them. They drove away the noble Roger Williams when he preached perfect freedom of conscience. Freedom was not what the Puritans wanted, but authority-worship. Hence they also persecuted the Quakers.

Opposed to this Puritan character, there became developed in the more Southern colonies a more tolerant, cheerful, reckless character. In some colonies—as, for instance, in North Carolina—this character developed itself in its extremes, and thus degenerated into utter lawlessness. In no other colony was the law administered so loosely as in North Carolina. The rule was to let every one do as he pleased; whereas amongst the Puritans the rule was that every one should be allowed to do only what was prescribed.

Separated, as these colonies were origi-

nally, into townships, counties, &c., these smaller parts soon formed themselves into a whole, as one colony, connected by more or less strong ties. Codes of law were not established, but the English common and statute law was provisionally adopted so far as it was found to be appropriate. Where it did not suffice, the colonists made new laws—at first in personal gatherings, and afterwards through their legislatures. Rational connection in their legislation was thus out of the question. As characteristics of their modes of forming commonwealths, let us remark that the new Plymouth colonists conferred each upon the other the necessary power of government before landing. In Massachusetts, the legislature consisted at first of the Governor, his assistant, and each citizen. In the year 1634, when the number of citizens had become too large for such gatherings, the first delegate assembly was elected. In the year 1636 voting by ballot was introduced. In Connecticut an ordinance provided that if the Assembly of Representatives should not be called together at the proper time, the free citizens should have the right to assemble themselves in Convention.

These different colonies at first had little communication with each other. Geographical position, as well as provincial peculiarities, kept them apart; and it was only gradually that the conception of a union arose amongst them. This union-idea at first found its chief support in the religious element, and hence was preeminently expressed in New England. As early as 1643 the "United Colonies of New England" formed themselves into a political whole. Their act of confederation left to each colony complete authority within its own limits. But a Congress, consisting of two commissioners from each colony, had the power to declare war, to conclude peace, and to consult about matters of common interest. Each colony was obliged to furnish an equal number of soldiers and an equal amount of money for every war.

This first confederation of some of the colonies lasted only about forty years; but Indian hostilities, and England's wars with foreign powers, frequently compelled all the colonies to unite for provisional purposes. Commissioners were selected at such times to come together and consult about the measures esteemed most advantageous for all the colonies, and these gatherings did much to strengthen the dawning desire for a more complete union. At first England supported these union tendencies; but as soon as they threatened to result in an effectual union, England protested against them. This occurred in 1754, when a Congress of the colonies—New Hampshire, Massachusetts, Rhode Island, Connecticut, New York, Pennsylvania, and Maryland—came together to draw up a plan for the union of all the colonies under a confederate form of government. The most prominent men of the country were elected to this Congress. It was *unanimously* resolved that a union of the colonies was absolutely necessary for their preservation. A plan of government was also drawn up, containing some admirable provisions. The colonial legislatures were to elect the members of a Congress, which Congress, together with a President, to be appointed by the King, should administer the government of the union. Congress was to have power to declare war, conclude peace, make laws for the new Territories, organize troops, levy taxes, &c.

But all the colonies, except Massachusetts, expressed indignation at this proposed form of government. Franklin, who was a member of the Congress, declared afterwards that it would have been absolutely impossible to form a union of the colonies against England without resorting to the most intolerable tyranny and compulsion.

Perhaps, indeed, the people of the colonies were actuated in this opposition to union by a very correct instinct. A union, concluded when they were all weak bodies, was likely to have proved dangerous to their freedom and independence. After attaining a certain amount of independent strength and internal power, a union was no longer so dangerous. What neither the danger threatened constantly from Indians and European powers could effect,

was finally achieved through England herself. A stamp tax and a tea tax ripened the conception that no individual can be secure of his rights so long as he is a member of a limited commonwealth, or, to speak strictly, that absolute security of individuals is possible only in a confederate republic, which extends over the whole world and embraces all rational beings. In this, its universal application, this conception was probably comprehended by very few; but in an indefinitely limited extent it surely was comprehended by all the advocates of a union, and this comprehension united the several colonists into an American people.

The reason why a limited commonwealth cannot afford security to individual rights is, that adjoining States may at any time attack these individuals, since no agreement to respect each other's rights has been made between the citizens of one and those of another State. Such a mutual agreement is only possible under a confederate form of government, and is complete only when all the States of the world have joined it. For as long as a single State remains outside of it, war is always possible, and hence no individual is perfectly secure. In a confederate republic war is impossible; only insurrections, or revolts, may arise, if the executive power is not well enough organized.

In the year 1774 the first Congress of the United Colonies assembled, therefore, in order to consider the common welfare. From this Congress emanated an address, asserting the fundamental principles upon which our republican government is based, and recommending, in order to secure these rights, that all commercial intercourse with England be stopped—a recommendation which, being generally observed, gave to the Congress an importance which enabled it to continue its sessions, until, on the 4th of July, 1776—authorized by the people of the colonies—it emitted the immortal Declaration of Independence.

This document is, therefore, the cornerstone of our form of government, for through its means was realized the condition of that government—union of all the colonists into one commonwealth, and independence from external powers. Very properly is it, therefore, made the special object of veneration on the part of the people—for the Declaration of Independence contains the *a priori*, and hence eternal and unchangeable, principles of law, upon which alone a rational form of government can be established. No power in earth or heaven can annul these rights or overthrow these principles. They are eternal as reason, because they alone make reason possible. The Constitution, on the contrary, is subject to change, and may be constantly improved upon.

Thus arose and was realized the conception of our republic, as the universally valid form of government for all men, and based on the rights of all men. What constituted the newness of this conception was this: that for the first time in human history a commonwealth was established to secure individual rights, and that both sides of the problem of rights—the sanctity of individual freedom, and the necessity of a universal union of all individuals into one commonwealth—were equally upheld. *Man* was the basis of this commonwealth—not a race, or a nationality, or a limited people. To secure the rights of man alone was this commonwealth established—not for its own sake, and not for the sake of national greatness or prosperity.

On the other hand, in thus existing only for the individual, and recognizing no other limitation, the union existed for *all* individuals, for the whole race of men. Individuality and universality were equally acknowledged in this new form of government.

The war now assumed more serious proportions, and the Congress constituted itself a sort of provisional revolutionary government, as the transitional condition from colonial dependence to the independence of an organized confederate republic. For a while the Congress ruled with almost absolute sway, extending to Washington, at one time, full dictatorial powers for six months; but as the war continued, and the enthusiasm cooled down, the Congress lost the respect of the people. The neces-

sity of a realization of the Declaration of Independence, and hence the establishment of a common government became more and more apparent. Each State was at liberty to obey its orders or not. Washington did his best to suppress the growing dissolution and anarchy. Finally, the Congress agreed upon some Articles of Confederation, which were transmitted to the several colonies for their ratification. In spite of an earnest opposition, these Articles were soon ratified, and in 1781 the first Congress under this new order of things came together.

But these Articles did by no means realize the conception expressed in the Declaration of Independence. They established no republic, no commonwealth for all the colonies, but simply a "league of friendship." They did not create a legal relation between the citizens of the several States as individuals, but simply a political relation between those States as independent bodies. A political relation, however, is simply dependent upon questions of expediency, and may be altered whenever expediency seems to require alteration. It affords no security to individual rights. The reason is, that there exists nowhere an absolute power of compulsion in case of a violation of law. Any State may refuse to recognize, at some time, the authority of such confederation, and there exists no *judicial* power to punish. In a true confederate republic this judicial power exists, and hence a question of violation of law cannot arise between one State, as State, and the general government; but only between the general government and the citizens of a State, as individuals; and against individuals we do not employ war, but the power of the courts.

The weakness of the Articles of Confederation soon became apparent, but was forgotten amidst the rejoicings for the victories of the American armies, and did not exhibit itself clearly till after peace had been concluded, in 1783. Soon after that peace, Washington issued a circular letter to the Governors of the several States, which, like all the writings of this noble man, showed his great political wisdom, and in which he earnestly pointed out the defects of the Confederation-Articles, urging an immediate reorganization of the existing form of government as absolutely indispensable for the future safety of the American States. In few words he characterized the new Union which ought to be established, unless all the results of the late wars were to be jeopardized again. "We must have an indissoluble union," writes he. "Whatever measures have a tendency to dissolve the union, or contribute to violate or lessen the sovereign authority, ought to be considered as hostile to the liberty and independence of America, and their authors treated accordingly." "For it is only in our united character, as an empire, that our independence is acknowledged. The treaties of the European Powers with the United States of America will have no validity on the dissolution of the Union."

But the patriotic admonitions of Washington were unheeded. The confederation daily became more impotent. So little did it command respect that a number of the States neglected to send representatives to the sessions of Congress, and that it often was difficult to bring together a quorum in Congress. In each State two parties violently opposed each other—one party endeavoring to let all violations of law go unpunished, and thus to institute a condition of complete anarchy, whilst the other party endeavored to arrest this movement. In some of the Eastern States, Massachusetts, New Hampshire, Connecticut, &c., this state of things culminated in public outbreaks.

At last Washington, Hamilton, Madison, and their friends, succeeded in inducing the Confederate Congress (1787) to call upon all the States to send delegates to a new Constitutional Convention.

After a violent and bitter election, this Convention assembled. Three parties were represented in it. The one party, led by Patrick Henry—although he was not in the Convention, having refused to participate in it—opposing every proposition calculated to take away from the several States their so-called sovereignty and independence—i. e. their absolute limited-

ness. The second party, led by young Hamilton, in favor of the strongest possible form of a central government. The third party had its chief leader in that highly gifted and wisest of statesmen, James Madison, who, whilst acknowledging the justice of both extreme views within certain limits, endeavored so to fix these limits as to realize the object of both extreme parties, by inventing a form of government which would secure both Patrick Henry's great idea—absolute freedom of the individual, or impossibility on the part of the government to transgress the Constitution—and Hamilton's leading purpose—a supreme power strong enough to punish every violation of law throughout the united commonwealth.

The federalists—as were at first called *all* the friends of a union—desired to form thirteen different States into *one* commonwealth; but this intention was not incompatible with a desire to maintain the rights of the States. There were State Rights men among the federalists as zealous as Patrick Henry; but the distinction was that whilst Patrick Henry's party wished to uphold the authority of each separate State, and repudiated with contempt the proposition to unite all the citizens of those States into one people, the State rights men of the federalist party advocated the maintenance of the States' rights as *means to afford better security for the rights of the individual*, or as a part of that check upon the general government which we have shown to be absolutely necessary in a rational form of government. To the federalist State Rights were a *means;* to the State Rights party they were an *end.* The federalist State Rights men intended to use the rights of the States as one of the means both to preserve the general republic and to secure individual freedom—nay, it might even be said that their desire to establish a strong general government was inspired by a desire the better to secure the existence of the several States. For the system of government advocated by Patrick Henry and previously tried, had neither secured the independence of the States nor been an efficient guarantee of individual freedom. Nor will such a system ever accomplish its purpose. Independent and sovereign States are the greatest danger to individual freedom. They establish that very centralization and possibility of despotism within their limits which is wrongly apprehended to result from a confederate union. In a well organized confederate republic, each State is a check upon the power of the general government, and the general government is equally a check upon the several States.

While Hamilton's party, therefore, opposed the proposed Constitution because it did not establish a strong enough government, Patrick Henry's party opposed it as inaugurating a despotism. The establishment of the Presidency, particularly, was violently denounced, and its dangers pointed out. So bitter was the opposition on both sides that only 39 out of 65 elected members to the Convention signed the Constitution when it had been finally agreed upon. Sixteen members refused to sign it, ten did not even attend the Convention to sign it. A bitter struggle had now to be fought before the people of the several States, to whom the Constitution was to be submitted for ratification. In Virginia and Massachusetts the contest was most embittered; and it needed Madison's genius to save the Constitution in Virginia against the powerful assaults of Patrick Henry; for this Constitution—upon that all were agreed—destroyed State sovereignty and created one supreme government.

It was, indeed, a mighty deed, this adoption of the Constitution. For the first time in the history of mankind the second fundamental principle of the Declaration of Independence, that the people have a right to alter their form of government, was actualized, when the citizens of the several States, in peaceful assemblies, pronounced themselves dissatisfied with their previous form of government and created a new one.

It is remarkable how little the Constitution satisfied even the best patriots at first. Only Washington and Madison, most clearly the latter, seem to have immediately comprehended the greatness of the

work accomplished; and even they were struck with surprise as, year after year, the artistic marvels of the machine developed themselves before their eyes. Franklin was dissatisfied with the division of the Congress into House and Senate, and with the reeligibility of the President. Jefferson also compared the President, who would be reelected every four years, to a Polish king.

Thus, even after the adoption of the Constitution, the fight was still kept up. True, Patrick Henry's party had died out, because its issue had been killed off, but the split now arose in the party of the federalists. The advocates of a stronger centralization, led by Hamilton, and who were now alone called federalists, opened a vigorous warfare upon the opponents of centralization, who rallied under Jefferson, and assumed the name of democratic republican party. This contest has continued in various forms up to the present day, and can only be finally settled by showing to each extreme that in itself it contradicts itself, and can maintain its existence only by granting equal validity to the other.

V.

The sole end of State organization is, as we have seen, to secure to each individual his self-limited sphere of freedom. This security can be effective only if the limits of that freedom are strictly defined, and the punishments to be visited upon the violation of those limits strictly prescribed; and if a power of government has been established which will assuredly punish every such violation, but is itself impotent to become guilty of violating it.

This end of all State organization is thus expressed in the preamble to the Constitution:

"We, the people of the United States, in order to form a more perfect Union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity," &c.

Every State organization necessarily presupposes a previous condition of the people it unites, upon which it therefore bases itself to a more or less extent. The organization of our Union proceeded from the historical preexistence of thirteen independent States, all having already more or less perfect constitutions, laws, and forms of government. The question arose: Should these States be utterly cancelled in the new form of government, or should their independence be in part recognized? In other words: Would it be more advisable to utterly suspend all previous organizations of the people amongst themselves in small communities, to declare null and void all previous contracts, guarantees, laws, &c., and establish an entirely new order of things; or to recognize as valid these previous law-relations, and, accepting them all as valid, to merely gather them all together into a more comprehensive unity? The latter course was adopted. The existing State, county, and township organizations were accepted as the legitimate expressions of the will of the people, as their original and direct contracts with each other to observe each the rights of the other. Such original and direct compacts will, indeed, always arise in the shape of small communities, and it is the impossibility of a scattered people to *directly* recognize each the other's rights which is the ground of our American jealousy of the right of *local* self-government. Nevertheless these *small* local organizations have also a germ of unsafety, which again is the ground of our American instinct of expanding or enlarging our republic to the utmost extent. History, as well as experience, has shown that in small *independent* communities the individual is not safe against the majority. For who is to check the power of the majority when unjustly persecuting the individual? The histories of the Greek Republic, and of Venice, illustrate clearly the danger of small State organizations, so far as individual security is concerned. Anarchy, party despotism, and bitter conflicts of factions are the results—results which have led the opponents of republican freedom to declare that the people are incapable of governing themselves. That the minority has not sufficient protection against the majority under a republican

form of government, has been the constant objection; and it is very true when applied to petty democracies, but in the construction of our commonwealth it has happily no application.

Perfectly to secure the rights of individuals it is, therefore, necessary to combine small State organizations into one large one, to unite in a synthesis both requirements of local self-government and an extensive empire; and this synthesis is realized in the form of a confederate republic. The framers of our constitution found the various local self-governments ready at hand. They did not abolish them in the new form of government which they established, but, on the contrary, recognized their legal validity, and granted to them a new independent existence; but at the same time they *constituted* them such independent *parts* of a whole, thus retaining, in the new form of government, the advantages of local self-government, while superadding to it the additional safeguard of individual freedom which results from a large commonwealth.

This additional safeguard is of a twofold character, viz., first, it serves as a protection against the attacks from other, external States—in the case of our republic, for instance, against the attacks of the European powers and of the Indians; and secondly, it serves as a protection against possible despotism in local governments. Let us illustrate the latter despotism, never sufficiently recognized by the so-called State Rights men, and yet a very important factor in the true understanding of our form of government.

Whenever a certain class of citizens, led by common passions or common interests, combine to establish laws which infringe upon the original rights of other citizens, anarchy or despotism must be the result—despotism if that party succeeds, and anarchy if its success is forcibly resisted by an outraged minority. This common interest may be of a religious, financial, or any other possible character. Manufacturing interests, commercial interests, agricultural interests, or railroad interests, may thus establish themselves into power, deprive the minority of its just rights, and thereby incite to rebellion. Now, in a small State it is always difficult, often impossible, to balance these several interests through each other, because, from geographical reasons, the one interest is usually supreme. The best contrivance to make impossible such a despotism of a party or of a particular interest is territorial extension, whereby one and the same commonwealth is made to embrace all possible interests, views, and passions, which thus can each keep the other in due check. When one interest or party conspires to rule unjustly in one part of the commonwealth, an opposite interest or party in another part of the commonwealth will have the power of annulling such conspiracy, by annulling the unjust measures the former may adopt. Supposing, for instance, that in one of our States a political party should abuse its power by establishing a State religion, thus infringing on the rights of conscience of the minority, that minority would have legal redress in appealing to the common government of all the States, wherein that one State could not well prevail against all other States. On the other hand, if the general government should abuse its power by establishing a religion for the whole commonwealth, each separate State would again have redress by an appeal to their common judge, the Supreme Court.

The confederate republic may be, therefore, well pronounced the only lawful and rational form of government. It is the only form of government which secures perfectly the freedom of each individual. It is also the only form of government which secures that freedom more perfectly by its territorial extension, and hence in the highest degree, by extending itself over the whole globe,* and which thus realizes the second requirement of a rational form of government, that it shall embrace the whole human race in one commonwealth.

A question has sprung up between the State Rights party and the opposite party as to whether the constitution which es-

* It is, therefore, the simple, naked truth to say that a single individual cannot be perfectly free, until *all* individuals are free.

tablished our commonwealth left untouched the independence of the original thirteen States or abolished it. It did neither, or rather both. There can be no doubt that the act which created a new form of government utterly abolished all subordinate forms of government in so far as they had previously an altogether independent existence; but the same act *reinvested those States with all the powers not expressly delegated in the constitution to the general government.*

The distinction is very important. Our form of government is not a confederation of separate States, but is the original formation of a new government by all the *individual citizens* of the old thirteen States. All laws under the constitution are made for individuals, not for States; and hence the democratic party is very correct in saying that only individuals can be rebels; while the party which holds that States can revolt thereby pronounces itself a radical State Rights party. It is true that the Constitution was adopted in each State as such; but each State in adopting it, did it as a part of "we, the people of the United States," hence as individuals, and did not delegate "powers," but rather by that adoption helped to create a new form of government, cancelling thereby its own previous separate and independent form of government utterly.

Hence although the independence of the States may now be as great, and their rights as many, as before the Constitution, the difference is this: *previous to the Constitution the States had these rights and that independence of themselves, whereas after that adoption they hold them under the Constitution.* Their previous form of government they derived from themselves; their form, after the adoption of the Constitution, they derived from that Constitution. In other words, it is one-sided to say that the general government is one of delegated powers. For the separate State governments are also of delegated powers. The Constitution expressly confers upon them, in so many words, all their previous powers. We have no absolute government at all in any one place, because we have it everywhere; our government is an in-itself-returning form of government—the highest of all forms. As Madison truly expresses it, the Federal and State governments are in fact only agents and trustees of the people, invested with different powers and established for different purposes.

VI.

Let us see, now, what specific powers the people delegated to the general government, and what sphere of independence they delegated to the several States. The powers delegated to the general government are delegated in three different manners; some are *exclusively* granted; others are granted to the general government and at the same time prohibited to the States; still others are delegated to the general government, but not prohibited to the States. In regard to the latter class of powers, the question often arises whether States can also exercise them, or whether they belong to the general government exclusively.

1. The Congress has *exclusive* jurisdiction over the seat of government, *exclusive* right to erect forts, arsenals, &c.

2. "The Congress has power to levy and collect taxes, duties, imposts and excises," and "no State shall, without the consent of Congress, levy any imposts or duties on imports and exports, except what may be absolutely necessary for executing its inspection laws," &c. Here the power to levy and collect taxes seems implicitly left to the States.

3. Congress has power "to establish a uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States." Here, therefore, the question seems proper whether States may or may not also pass laws of naturalization, since they are not expressly prohibited to do so.

The powers delegated to the general government are as follows:

"The Congress shall have power to declare war, grant letters of marque and reprisal, and make rules concerning captures on land or water; to borrow money on the credit of the United States; to raise and support armies; to provide and maintain a navy; to make rules for the government

and regulation of the land and naval forces; to provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions; and to provide for organizing, arming and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States respectively the appointment of the officers and the authority of training the militia according to the discipline prescribed by Congress."

The last clause is extremely vague. The question has arisen under it, whether the general government has the power to place the State militia under United States officers? Connecticut and Massachusetts refused, in 1812, to furnish their quota of militia under such circumstances, the Governor of Massachusetts declaring it his prerogative to decide whether Congress was authorized to call out the militia or not, since the Constitution invested Congress with that power only for specified purposes, namely, "to execute the laws of the Union, suppress insurrections, and repel invasions." The courts confirmed the stand taken by Massachusetts, and decided that it was left with the separate States to decide when those conditions had arisen, since the Constitution had not invested Congress with the power to decide thereupon. In the year 1827, however, this decision was annulled by the United States Supreme Court, and the President declared to have solely the power to decide under what circumstances the calling forth of the militia might be justified.*

But another important question in connection with the same subject has still remained undecided, namely: whether the militia is subject to federal or to State authority *before* being sworn into the service. If under State authority, then a refusal or neglect to enrol in the militia is a State offence; if under federal authority, then such refusal is a federal offence, punishable under military law. The courts have decided that the State fixes the punishment for such refusal or neglect. But if the State is the offended party, then the federal government has no power of conscription, such as was exercised in the last two years of the war. Again: if the State can fix the punishment, the question remains still open, can such punishment of a refusal to enrol be otherwise than in the nature of taxation or fine?

As regards the first result, that the general government has no power of conscription, or no power to compel citizens to render military service, there is probably little doubt amongst clear-minded men. It is sufficient to read the debates and polemical writings of the times when the Constitution was adopted to become convinced that the framers of that document never dreamed of granting such a power. Even Hamilton, the great advocate of a strong centralized government, repudiates the monstrous doctrine of general military duty. (See art. xxix. of the Federalist.) It is, indeed, not to be presumed that the men whose sole object in tearing themselves from the rule of Great Britain was to secure individual freedom, should have established a government with power to utterly annihilate that freedom. A republic with the power of conscription is, indeed, no republic; for in it no citizen is safe at any moment from having his whole liberty taken away, and himself put into slavery, since its Congress may declare war for any object it chooses, and immediately compel all citizens to do military duty under penalty of being shot as rebels. Who is to decide whether the war is such that citizens can conscientiously sacrifice their freedom and life to its object? Supposing Congress, in former times, should have declared war against Spain, in order to acquire Cuba as a slave State, would it have been disloyal to refuse to be shot for such an object? Were the Mexican wars of such a character as to constitute a refusal to be shot in their behalf rebellion? When President Monroe, in 1814, after the war with England had lasted two years, gently suggested a national conscription, the whole country arose as one man "to protest against this more than Napoleonic tyranny;" and nowhere was the opposition more bitter than in the New England States.

* See Kent's Commentaries.

Even if the Constitution did contain a provision granting the general government power of conscription, it would be unlawful, for men have not the right to deed away their liberty. Such a provision would be as null and void as a grant of power to take away the life and property of every citizen at the pleasure of Congress. Or is not freedom as inalienable a right as life and property?

As regards the second result, most of the States have recognized the principle that a refusal to enrol in the militia can only be punished by a fine. The Constitution of Missouri, for instance, provides: "No person who is religiously scrupulous of bearing arms can be compelled to do so, but may be compelled to pay an equivalent for military service in such manner as may be prescribed by law."

This does not exactly cover the case, but in practice it has always been found a sufficient protection. A rational provision would run in this wise:

"No person can be compelled to take up arms, but may be compelled to pay an equivalent for military service, to be collected in the same manner as other taxes."

"The Congress shall have power to define and punish piracies and felonies committed on the high seas, and offences against the law of nations, and to regulate commerce with foreign nations."

Also power "to coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures; to provide for the punishment of counterfeiting the securities and current coin of the United States; to establish postoffices and post roads; to regulate commerce among the several States, and with the Indian tribes; to prescribe the manner in which the public acts, records and proceedings of the several States, and the effect thereof shall be proved; to establish a uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States."

The two last-mentioned powers have also been claimed by the several States, but clearly without authority. Congress could not *establish uniform* rules on the subjects of naturalization and bankruptcies, if the several States had also the power to legislate upon them. So far as the subject of naturalization is concerned, there arises, moreover, this consideration: Since the Constitution provides that the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States, the exercise of the power of naturalization on the part of a single State would involve the assumption on its part to legislate for all the other States.

"The Congress shall also have power to promote the progress of science and useful arts, by securing, for limited times, to authors and inventors the exclusive right to their respective writings and discoveries."

The preamble of this clause is both very beautiful and very improper—beautiful in so far as the promotion of science and arts is highly meritorious, and improper in so far as it is not the object of law or government to promote science and arts. The object of government is purely to administer law, and the promotion of sciences and arts is a matter which the individual citizens have to take into hand. In the same respect, the conclusion of this clause is also both improper and ridiculously inadequate. It is inadequate if the object of the clause were really to promote science and arts; for there are certainly many better means of promoting them than by giving to every wretched novel writer the copyright of his injurious productions. It is improper because it was superflous to grant such a right as a constitutional privilege, since it is the simple duty of the government to protect authors and inventors in their *property*. It needed no constitutional provision to secure to authors and inventors their right to what they could prove to be their own property.

In this connection we may as well mention that the conception of an international copyright involves the most marvellous nonsense ever uttered in law matters. An author has the copy*right* of his work simply because the form in which he has put what he intended to say is altogether his individual property, precisely as every

other citizen acquires property only by imprinting his own form upon external objects. But property is held only *in a commonwealth;* and each citizen has a right of property *only in so far as all other citizens of that commonwealth have agreed to respect his property.* Outside of the commonwealth he cannot assert his right of property, because the outside citizens have not recognized it, and he has never calculated upon their recognition. In consideration, for instance, of Mr. E.'s respecting the rights of every other citizen of the United States, all those citizens are bound to respect his life, liberty, and property. But this agreement has not been entered into by him with citizens of other States. Outside of his commonwealth he has no rights at all, and is an utterly lawless being, as we have already shown, when we deduced from this very state of things the necessity of *one* form of government for all mankind. It is true, under the so-called law of nations, his life, liberty, and the property he carries with him on his travels, will be protected by civilized governments; not, however, because he as an individual can make valid his *right* thereunto, but because those governments fear retaliation upon other of their citizens who may chance to travel, say in the United States. The protection of his life, freedom, and property, is not extended to him as a *right,* but as a political expedient, or matter of courtesy, to facilitate which ambassadors and consuls are appointed. The question should, indeed, be clear enough. To constitute a legal relation two parties must make an agreement. But how can the citizens of one country make a legal agreement with possible future travellers, who are not present to execute their part of the agreement? Hence that protection afforded by one nation to travellers of another nation is simply a political expedient, and does not confer upon the traveller, as an individual, any rights at all. If a war breaks out between both countries, he had better not depend upon any such supposed *rights.*

Now the proposition to make this transitory courtesy a matter of individual rights means either to abolish all separate governments, or it means absurdity and injustice. It means the abolition of all separate governments if the doctrine is carried out logically—if each country obliges itself to thus protect *all* the rights *of every citizen* of the other country; for such an agreement between two countries involves the establishment of a higher power, which can take care that the agreement is observed on both sides. This higher power must be a general form of government for the two lower forms of government, which thereby confederate together into a union.

Or it is an absurdity. For if two countries agree to protect the rights of the citizens of each without establishing a common government, they make an agreement which can never be enforced.

Or it is an injustice. It is an injustice when two countries agree to protect the rights of only one *class* of their citizens, for instance, of authors and inventors. What privileges have these men that they should lay claim to a peculiar right? What justice is there in taxing the workingmen of England to pay for the legal measures which may be necessary to secure to an American author such a copyright under an international law? How can the American citizen ask from *all* the citizens of England a right for which he confers no reciprocal benefit, since he is not a member of their commonwealth, and hence has not agreed to protect their rights?

It is all nonsense to speak about the indirect benefit which will accrue to the people of both countries from the additional exertions of literary men when their labors shall be made more profitable by such an international copyright law. The works of literary men who need such a stimulus will confer no benefit, but positive injury, to the people. There never was a book written for money which might not as well have been left unwritten. To a man of science, or to a true artist, no inducement of additional pay would be an incentive to additional labor.

" The Congress shall also have power to exercise exclusive legislation in all cases

whatsoever, over such district (not exceeding ten miles square) as may, by cession of the particular States and the acceptance of Congress, become the seat of government of the United States, and to exercise like authority over all places purchased by the consent of the Legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings."

Also, "to declare the punishment of treason; but no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted. Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court."

The framers of the Constitution were thus explicit in defining the crime of treason, and limiting its punishment—whilst in all other cases the definition and punishment of crimes is left to the law-making power, Congress—because the charge of treason and rebellion has, in all liberal countries, been the great lever whereby one political party has endeavored to put the opposite party out of power.* There is no greater danger to republican countries than the making use of this charge of treason by one party against the other. When one party raises the cry of traitors and rebels against an opposite party, in order to maintain itself in power, republican freedom is in danger of utter annihilation.

"The Congress shall have the power to admit new States into the Union; but no new State shall be formed or erected within the jurisdiction of any other State; nor any State be formed by the junction of two or more States, or parts of States, without the consent of the Legislatures concerned as well as of the Congress."

This clause involves two problems: the admittance of new States, and possible changes in the geography of existing States. In regard to the first, it was generally held, previous to the purchase of Louisiana, that the Constitution did not authorize the general government to acquire new territory or admit any foreign people into the Union. Jefferson, who made that purchase, held the same views, and desired the purchase ratified, after the act, by an additional clause to the Constitution authorizing such purchases. But such an amendment was never made, and the legal construction of that part of the above clause is therefore unsettled, except in so far as the frequent actual purchases of new territories may be held to have settled it. Madison's commentary in the Federalist would seem to indicate that the admittance of new States, other than those which might arise from the territory held at that time by the United States, was foreseen in the new Constitution, since he regards it in that respect superior to the Articles of Confederation, which merely made provision for the future admission of Canada and the other British colonies into the confederation. There is, however, an *a priori* principle for the solution of this problem, which settles the whole dispute. No form of government is complete which does not embrace the whole race of men. To be rational, a form of government must therefore afford in its constitution a possibility for this, its universal extension. The Constitution of the United States cannot realize its object, to secure the rights of each individual, unless it provides for the admittance of all other States in the world into the Union in some shape or another; and if our republic should refuse to do so, the rejected States would have the right to make war upon the United States as constructing an obstacle to the supreme rule of the law over the earth.

The question might arise as to where the power is vested to admit new States. Clearly enough in Congress, although it is not specifically granted; for Congress is the sole judge of qualifications of its members, and by declaring delegates from any Territory or State to be entitled to seats in Congress, Congress virtually de-

* See Madison's remarks on this subject in the Federalist.

clares that State a member of the American Union. The *purchase* of a territory from another power is, of course, unlawful, (for a territory is not the property of any government, but simply of the indiduals who inhabit or may inhabit it), and is to be regarded as the purchase of any other article to which the possessor has no title whatever, but for whose mere *possession* it is advantageous to pay a certain equivalent. The seller having no title to the territory, the purchaser, of course, also has none. The whole transaction is not a legal one at all, but simply one of expediency—one of *might*, not of right.

The second part of the clause prohibits Congress from changing the local forms of government established by the people at the same time they established their general form of government, unless the people of such geographically specified parts of the whole consent to it. This is an essential provision, since, as we have shown, each State is in a confederate republic a check upon the general government, and an arbitrary change in the number and position of the several States by Congress would lead to an endless "gerrymandering," to the great detriment of the people. On the other hand, it is suggested by this clause that such changes *may* become wise; and when it is considered that the thirteen original States have now increased to thirty-six, without essential changes being made in their constitutional representation, it seems entirely probable that a new geographical division of the whole Union into States, by and with the consent of the inhabitants of such States, of course, might be a wise measure.

"The Congress shall have the power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular State."

From what we have said above, the correct construction of this paragraph, which involves the famous squatter sovereignty doctrine, is immediately apparent. A true title to the territories the United States do not hold; at the utmost a title by courtesy, or by the force of might. The present paragraph does not conflict with this view, since it only allows to Congress the right to make "rules and regulations" respecting these territories. With such rules and regulations the right of property of the squatters is entirely reconcilable. The squatters settle down, take possession, and become owners. They then proceed to establish a government. Congress cannot force them to send representatives to Congress, but only to establish a "republican form of government"—that is to say, a form of government which may become universal, *and hence certainly a part of our own* at some future time. By establishing preemption laws, and by selling all public lands at an extremely low figure, Congress in point of fact recognizes the right of the first settler to take possession of so much of the public lands as he may be able to cultivate; for the price at which the lands are sold is not sufficient to pay for the expenses incurred in surveying them, and in establishing land offices, &c. Land grants are, of course, utterly illegal.

"The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion, and on application of the Legislature, or of the Executive when the Legislature cannot be convened, against domestic violence."

Here we have it, therefore, clearly stated that it is one of the objects of the general form of government to protect the individuals of each State against possible party despotism. For a "republican form of government" is one which implies the consent of *all* individuals to its acts. When such consent ceases, the citizen who deems himself despotically treated prefers a suit, and the United States, in guaranteeing to the State a republican form of government, promises to carry out the final decision of the courts in the case of such citizen. This is the only correct construction of that clause. For the fact that the government of a State is not republican can be proved only if one or more of its citizens express their dissent from its acts. The question then arises whether

the dissenting citizens or the government are in the wrong—a question which the Constitution provides only the courts shall settle, and Congress has no other duty than to see that the final decision of the courts is carried out. Thus Mr. Garesché recovered, through the Supreme Court, a right unjustly taken away from him by the State government of Missouri. The Supreme Court merely pronounced the unconstitutionality (unrepublican character) of the act; and Congress would have been bound to protect Mr. Garesché against the government of his State, if that State governmnet had refused to comply with that decision. Congress, not having judicial power, cannot of itself decide, therefore, whether a State has a republican government or not."

The "protection against domestic violence" signifies, likewise, that no citizen who deems himself injured or treated by his State government in an unrepublican manner shall take the law in his own hand. He must appeal to the courts for redress; and if he uses violence the government of his State is entitled to the support of the forces of the general government, although the State government may have been legally in the wrong, and the rebel in the right. For so long as a form of government affords possibility of legal redress, resort to violence is an overthrow of republican government, and must be suppressed by the whole power of the general government.

"The Congress shall have the power to levy and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States."

It is to be observed that the levying of taxes, &c., is authorized only for the specific purposes of paying debts and providing for the *common defence and general welfare;* and that the expenditure of moneys for other purposes is unconstitutional.

"The Congress, whenever *two-thirds* of both houses shall deem it necessary, shall propose amendments to this Constitution, or on the application of the Legislatures of two-thirds of the several States, shall call a convention for proposing amendments, which, in either case, shall be valid to all intents and purposes as a part of this Constitution, when ratified by the Legislatures of *three-fourths* of the several States, or by conventions in *three-fourths* thereof, &c.; provided that no State, without its consent, shall be deprived of its equal suffrage in the Senate."

It is clear, from what we have said before, that one part of the fundamental compact of a people must be unchangeable —namely, that which declares the inalienable rights of each citizen, and which, in our form of government, is contained in the Declaration of Independence. It is equally apparent that the other part, which specifies the *manner* in which these rights shall be secured to each individual, must be changeable, since, as a work of art, it is necessarily subject to infinite perfectibility. No constitution is rational which does not provide for this final mode of redressing wrongs which may have resulted from imperfect organization, because it fails to provide against revolution.

Now, since a constitution must be adopted by the *unanimous* consent of every individual of whom it is to make a citizen, amendments would likewise seem to require unanimity. The reason of this unanimity lies in the inviolability of contracts. A number of citizens have gathered into a State organization to secure their inalienable rights. After much labor they perfect a constitution which seems to each to guarantee him perfect security in the possession of those rights. He does not enter the State unless he is convinced of this security, and only *because* he is convinced of it. Now, if the others should proceed to change that constitution in such a manner as would appear to him to furnish a very imperfect security, they could not lawfully force him to give his consent to it, and his protest—though that of a single individual—would invalidate the whole new constitution. This doctrine is generally recognized in politics by requiring very large majorities in cases of constitutional changes, and the distinction

between majorities for the constitution and other majorities is this: in the constitution, if unanimously adopted, each individual has expressed his willingness to submit to the action of bare majorities under certain circumstances, being convinced that the constitution prescribes such other checks as will prevent those majorities from asserting despotic authority.

But how is this unanimous majority, in the case of constitutional amendments, ever to be obtained? A mere voting against the amendment would not imply unchangeable objection to it as a whole; and hence it has been considered that by requiring a very large majority the conscientious opponents of a change will be so few as readily to agree to a separation from the commonwealth—i. e. to emigration. Our Constitution, in requiring the incentive to amend to proceed from two-thirds of the States, and the ratification to be completed by three-fourths, approaches an absolute majority as near as seems possible.

Finally, "the Congress shall have power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof."

That is to say, Congress has the power to apply the powers delegated to it to specific cases—almost a superfluous clause.

These specific powers, which establish definitely enough the relations between the general government and the governments of the several States, and scarcely permit—except in the few cases noticed—a collision between both parties, are *all* the powers which the general government can lawfully exercise; and it would seem superfluous to *prohibit* Congress from exercising any others. It was considered expedient, however, to add some restrictions, partly because history had shown a tendency on the part of legislative bodies to usurp judicial power, and partly to secure *equal* laws for the several States as States. We now proceed to examine these restrictions.

VII.

"No bill of attainder, or *ex post facto* law, shall be passed."

Congress is prohibited from passing bills of attainder, because such bills involve a judicial proceeding, under the cloak of a legislative enactment. No legislative body shall have the power to pass any enactment which has the effect of a judicial sentence.

Ex post facto laws are prohibited, because their passage would be a violation of existing laws. Whatsoever is not prohibited, citizens are at liberty to do. Whatsoever punishment is affixed to a crime, that, and no other, must be inflicted. All *ex post facto* laws would be judicial decisions, under the cloak of legislative enactments. It may here be observed that *ex post facto* laws can be clothed in the garb of judicial decisions. If a judge in a law case *interprets* a law in an arbitrary manner, giving the law a meaning which it obviously has not, he thereby makes his decision an *ex post facto* law, for he decides the suit upon a construction of law which was utterly unknown to the parties of the suit.

"No capitation, or other direct tax, shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken."

"No tax or duty shall be laid on articles exported from any State."

"No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another, nor shall vessels, bound to or from one State, be obliged to enter, clear, or pay duties in another."

"No money shall be drawn from the treasury, but in consequence of appropriation made by law," &c.

"No title of nobility shall be granted by the United States."

"Judgment in cases of impeachment shall not extend further than to removal from office and disqualification to hold and enjoy any office of honor, trust or profit, under the United States; but the party convicted shall, nevertheless, be liable and subject to indictment, trial, judgment and punishment, according to law."

That is to say, again, the legislative body must not usurp judicial powers, even in cases affecting government officials.

"No religious test shall ever be required as a qualification to any office or public trust under the United States."

These are all the restrictions upon the power of the General Government contained in the original Constitution. They did not seem, however, sufficient to the Patrick Henry party, who foolishly imagined that Congress might possibly usurp powers not granted expressly, and that the most effective way to prevent such usurpation would be to expressly prohibit Congress from exercising others. The first three of the famous amendments which were accordingly added to the Constitution have this object in view.

The impropriety of such prohibitions, however, is immediately apparent. The first of these famous amendments, for instance, says that Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech or of the press, &c. But what need is there to prohibit Congress from exercising these powers, unless under the presupposition that legislative bodies have these powers? The original Constitution proceeds from the assumption that Congress has no other powers than those expressly conferred by the people in the Constitution, and that it is useless to prohibit powers which it has not. *No* government has the power to prohibit freedom of speech, or to establish a religion; and the assumption in this amendment, that such power does exist, is a grave defect in our Constitution. The second amendment, providing that the right of the people to keep and bear arms shall not be infringed, is not only unnecessary, but a self-cancelling proviso. "A well regulated militia," however, "necessary to the security of a free State," may happen to be engaged in unlawful resistance to the decisions of the supreme power, in which case their "right to bear arms" must be considerably "infringed upon." Indeed, no person has an *a priori right* to bear arms, and in large cities it is usually forbidden to carry weapons. A legislative enactment prohibiting the use of arms altogether would be far more rational than this amendment. Another objection to the enumeration of rights is this, that it can not possibly be exhaustive, if it goes beyond the three original rights of life, liberty and property, and hence leaves open the implication that other rights, not specified as beyond the reach of government, are within its reach. The framers of the amendments were conscious enough of this, it seems, for the ninth article of the amendment says:

"The enumeration, in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

An effective bill of rights must be exhaustive, and this it can only be in *general* terms. The Declaration of Independence is, on that account, the most effective of all bills of right; and the effort to make the Constitution more perfect, by specifying some of the rights derived from the rights proclaimed in that act, has not been a successful one.

VIII.

Whether it was necessary to establish, moreover, in the Constitution those general *forms* of law, which are regarded as effective safeguards of individual freedom, such as trial by jury, freedom from being put in jeopardy of life and limb twice for the same offence, &c., may be well questioned. Those forms of law are not original *rights*, but, to a great extent, merely applications of them; applications which partly need not be specified, and partly may be, with equal effect, specified in the statute books of the several States, or in the congressional enactments.

Of these forms of law, the original Constitution specifies two:

"The privilege of the writ of *habeas corpus* shall not be suspended, unless when, in cases of rebellion or invasion, the public safety may require it."

The last part of this clause seems almost to annul the whole; for it is precisely in cases of rebellion or invasion that the writ of *habeas corpus* becomes invaluable; and it originally was obtained from King John for those very cases. When actual war

rules, the *habeas corpus* suspends itself, because the military power (might) suspends law (right). It is a self-contradiction that law should provide for its own suspension. The *habeas corpus* should never be suspended by any power other than the military.

"The trial of all crimes, except in cases of impeachment," which are no trials in law, "shall be by jury."

It is purely a question of expediency whether trials by jury are the most effective mode of administering justice or not; and hence, the right to trials by jury is in this paragraph confined to criminal cases, leaving to the several States the power to provide any other form of trial for civil cases. So great, however, was the veneration in which the jury system was held, that in the amendments to the Constitution the right to a jury is also extended to all cases exceeding twenty dollars.

The constitutional establishment of these two forms of law over the whole Union, as rights of each citizen, did not seem sufficient to the opponents of the Constitution; and hence, in the amendments to the Constitution, a large number of forms were added, which are not so much checks upon the General Government as upon the Governments of the separate States, and as regulative principles for the decision of the Supreme Court. They are contained in articles 4, 5, 6, 7 and 8, of the amendments to the Constitution. Whether they are properly parts of the Constitution—of the instrument which constitutes the government of a people—is questionable. The Constitution is not properly a legislative enactment, and it may be well questioned whether a legislative enactment can obtain constitutional sanctity and legality by merely being incorporated in the Constitution.

The original compact of a commonwealth is, as we have said before, a declaration of the original rights of each citizen. This compact, this declaration, is, in the case of our form of government, the Declaration of Independence. The Constitution *constitutes* the Government, by means whereof those rights are to be secured to each individual, and all law disputes are to be decided by the regulative principle of those original rights. Whether a legislative enactment is made part of the Constitution or not, does not give it of itself validity, but simply whether it agrees with the principle of those original rights. The final grounds of decision of all constitutional law questions must be traced to the Declaration of Independence.

IX.

In determining the relation between the General Government and the Governments of the several States, we have seen that, in regard to the General Government, this relation could only be established by *affirmative* grants of power. The General Government is to have only these powers, and none others. Hence, all the others—an infinite number—"are reserved to the States respectively, or to the people." It was superfluous to state this in the Constitution itself. If, therefore, the powers of the States are to be determined in their relation to the General Government, it can only be done *negatively*, by prohibiting certain powers to the State, namely, all those powers the exercise of which would cancel the powers delegated to the General Government. They are a fixed number, and specified in section 10 of the first article of the Constitution: "No State shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts; or grant any title of nobility; nor lay any imposts, or duties on imports or exports, &c.; nor lay any duty of tonnage; keep troops or ships of war in time of peace; enter into any agreement or compact with another State, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay."

The mode of procedure in a case of violation of this section by any State is not specified in the Constitution, though this is a question of great importance, as, for instance, if two or more States should

confederate together. The assumption seems to be, that there will always be some citizens in such State or States who will bring the matter before the courts. It is clear that Congress cannot take upon itself to determine whether a State has violated this section of the Constitution; and even if it had the power so to determine, what punishment could it prescribe, for instance, if a State had emitted bills of credit? The same rule evidently applies to the States which applies to the General Government, namely, that it is the province of the United States courts to decide whether either party has transcended the powers conferred in the Constitution; for if Congress had the power to decide whether States have transcended their powers or not, the States might justly claim, as indeed they have done, that it is their prerogative to decide whether Congress has transcended its powers or not. It is only in cases of insurrection that Congress has the power to interfere without judicial process, and for the reason that an insurrection of the people and a suspension of the power of the courts always go together, and that hence judicial process is rendered impossible. If the courts are not suspended, there is no insurrection. In all other cases, the complaint against State authorities must be preferred in the courts. For instance: A citizen refuses to accept bills of credit which a State has declared legal tender. He appeals to the United States Government, through the courts, and that government is bound to protect him.

X.

Having thus delegated to the General Government enumerated powers, prohibited to the States the exercise of powers which would annul them, established a number of legal forms over the whole extent of the Union, as the best known safeguards to individual freedom, which no State Government should have the power to suspend, and thus completed the determination of the relation between the several State Governments and the General Government, the Constitution moreover establishes the *form* of the General Government. This form is threefold, separating into the legislative, executive, and judicial; and the reason for this separation is, that each department of government, whilst aiding, may at the same time be a check upon the others, and render impossible any abuse of power.

The necessity for such a check upon itself in a form of government is as apparent as the necessity of the conception of law itself. Men enter into a legal relation, not because one person has actually violated the rights of the other, but because the possibility exists that he may violate them, and this possibility must be removed. Law is established in order that it may not be exercised, has existence only when it does not exist, and does not exist when it has existence. This itself-cancelling character of the conception of the law shows it most clearly to be merely an intermediate conception, a conception existing not for the sake of itself, but of another conception, namely, the conception of morality. Again, men establish a government, not because some one has applied the law wrongly, or has neglected to apply it, but to prevent the possibility of the law ever being wrongly applied, or not applied when a violation of rights has occurred. But what power is to prevent the *Government* from neglecting or wrongfully applying the law? Here, again, the itself-cancelling process must be introduced, a contrivance invented, which shall cancel the Government the moment it attempts to violate the law, or refuses to apply it. The whole object of government is to make itself superfluous; it exists only to cancel itself by infallibly executing the law; and in order that it may never have any other object, may never exist merely to maintain itself, it must return into itself by means of a division of its powers, and a system of checks thereby established.

The necessity of this division of powers has indeed been recognized by all modern republicans. Madison says: "The gathering of all powers—the legislative, executive, and judicial powers—into one body, whether it be a single person, or composed

of many, an hereditary and self-made regent, or an elected one—is the true definition of tyranny." Montesquieu says: "Freedom is impossible where the legislative and executive powers are united in the same person or body, and where the judicial power is not separated from the legislative and executive powers. Impossible in the first case, because the monarch or senate may order tyrannical measures, in order likewise to execute them in a tyrannical manner; impossible in the second case, because the judge is then also legislator, and life and liberty of the citizen can therefore have no security."

It is objected that such a division of powers divides and weakens the government. This is true, and not true. It weakens the government, most certainly —nay, renders it utterly impotent, whenever it proposes itself to violate the law, or to execute it unjustly—but it consolidates all the strength of government whenever the law is to be justly executed. For these several powers are not separate agencies; they are all connected with each other, and all conjointly, whenever the law is to be justly executed. It was precisely on account of this connection between them, that the Patrick Henry party assailed the Constitution, alleging that it established in fact *a single central government*. There is as much truth in this allegation as in the charge that our form of government is divided against itself. It is a single central government in every constitutional act either department may exercise; it is divided against itself, and cancels itself, in every unconstitutional act. It can maintain its existence only by remaining within its limits, and it ceases to exist the moment it transgresses them.

The question may, however, be properly raised: Why should the government be divided precisely into these three departments?

Originally, the people, having come together as individuals, and declared each to respect the expressed rights of all others, delegate to *one* government, established in the Constitution, the power necessary to protect in each individual these rights. But this one government, consisting of a certain number of officials, and wielding the whole power of the people, might at any time transcend the powers conferred in the Constitution, without the people having redress against such usurpation of power. Supposing this one body of government is called Congress, and its duty to be to pass only such laws as will be necessary to guarantee the rights of each individual citizen, as expressed in the Constitution, and on no account to legislate for its own benefit—(it is never to be an end for itself, but merely a means); let us suppose this Congress to appoint courts all over the country to assist in this execution of its laws — would any such courts have the right to decide a suit between a citizen and Congress itself—in other words, to pass upon the constitutionality of an act of Congress? Clearly not; such a judiciary, not established by the people themselves as a check, but established by the Government as part of its own machinery, would have no other duty to perform than to apply all the laws passed by Congress to the cases brought before them. Such is the case in England, where all acts of Parliament are the supreme law of the land, and courts must so regard them. All the courts of law in our own republic, which simply assist in the carrying out of the laws passed by the legislative body, no matter how they are elected or appointed, are only a branch of the great body of government, of the legislative body—as, indeed, such court decisions, in course of time, become the positive law of the land, and they afford no guarantee against congressional usurpation.

Quite a different body is the judiciary proper—that is to say, the judiciary provided for in the Constitution as a separate and independent body. This judiciary is established to try all cases wherein the Government itself is a party, or, in other words, to pass upon the constitutionality of the acts of Congress. By the establishment of it, each citizen of the United States has received a guarantee that the immense power of Congress shall never be

exercised to touch a single one of the rights guaranteed to him in the Constitution.

That this was the true intent in the establishment of the Federal Judiciary, appears clearly from the Constitution itself. All other powers granted to it are merely accidental, but this power of passing upon the constitutionality of the acts of Congress is its absolutely necessary and distinctive characteristic. Only by its means has each citizen a guarantee against Congress and the President. In so far, therefore, the judiciary is decidedly the highest body of the Government—but only in so far. Congress is the highest form of our Government, so far as the application of the Constitution to the conditions of the country is concerned; and the judiciary is its highest form so far as the ascertainment of the constitutionality of its acts is concerned. Each is equally the highest, or neither is the highest.

If thus the judiciary is an *a priori* necessary form of government, the case is different so far as the so-called executive power is concerned. Indeed, Congress is more of an executive body than the President; and in separating the executive body of the Government into these two forms, Congress and President, we need look for no ground of an *a priori* character. The whole question assumes the aspect of expediency, and can only be discussed on that field. The motive on this field is clear enough: to strengthen the judiciary, which could not be strengthened in itself by weakening the executive, namely, Congress. It was for this reason that part of the executive power (the chief command of all armies, the appointing power, and the veto power,) was conferred upon a President, elected by the people, and that, moreover, Congress was divided into two bodies, a Senate and a House of Representatives. This latter separation has, indeed, been proven by experience to be of great wisdom. A Congress composed of a single House of Representatives might be too passionate and contradictory in its legislation; a Congress composed of a single Senate might be too slow, too considerate, too conservative. By separating Congress into two bodies, it was possible to permit frequent elections for the one body without exposing legislation to constant alteration.

The House of Representatives is the expression of the people of the United States *as individuals*, that is to say, numerically. Why, nevertheless, in the establishment of congressional districts, the geographical limits of States should also have been considered, is not to be accounted for logically, and has, indeed, often enough led to violent debates. For all practical purposes, however, the House may be considered as the representative body of all the inhabitants of the United States, as they are enumerated in the census. The question arises: how many of these individuals shall be entitled to one representative? It is solely a question of expediency, and has to be decided by practical experience. As the chief apprehension will be that Congress may legislate to the advantage of one section of the whole commonwealth, neglecting the interests of other sections, it would seem unnecessary to make the number of representatives very large. One representative, for instance, representing all the individuals living between the Missouri river and the Arkansas line, will be as likely to represent all the interests of that section as half a dozen representatives representing that same section, but each one elected by a small part thereof. Moreover, large legislative bodies are more easily led by demagogues, and have never been famous for prudent legislation. At the adoption of the Constitution, when the population of this country was very small, it was resolved to allow one representative to every 40,000 inhabitants. But Washington opposed this, as being too small a representation, and proposed one representative for every 30,000 inhabitants. This was agreed to. As the country became more populated, and Congress, under this apportionment, threatened to become an anarchical body, representation was cut down again. In 1842, it was provided that one representative should be allowed for every 70,680

inhabitants of a State, and an additional one for a fraction over one-half of that number. The rule will, of course, be changed constantly. As the country extends, and the number of States increases, it will become imperatively necessary to cut down the number of representatives to a rational figure; and the time may not be far distant when few States will have more than four or five representatives in Congress.

Every male citizen twenty-five years of age, and having been a citizen of the United States for seven years, is eligible to the House of Representatives.

To hold office is not a *right*, but an honor or privilege. Conditions may be attached to it, without infringing upon the *rights* of citizens, provided these conditions are attainable to *all* citizens equally. Religious tests are therefore forbidden in the Constitution. The Constitution stipulates very few conditions—indeed, only two: age and citizenship—from men, but it altogether excludes women from the holding of office. The question arises: if the conditions must be the same for *all* citizens, how can women, as a sex, be rendered ineligible to office? The answer is, women are not excluded by reason of their sex, but by reason of their present or prospective maternity, which will render them physically incapable of performing the duties of their office. If women wish to claim it as a right to be eligible for office, it is certainly very unfortunate for them that nature has only rendered women capable of being mothers. But it is a matter which they will have to settle with nature. The law says, "all persons who may possibly become mothers, and thus be physically unfit for holding office, shall be ineligible;" and that this provision does not apply to men, is certainly not the fault of men.

"Members of the House of Representatives shall be chosen by the people of the several States, and the electors in each State shall have the qualifications requisite for electors for the most numerous branch of the State Legislature."

There is an important implication here, namely, that the same electors who choose the *most* numerous branch of the State Legislature do not necessarily choose its *less* numerous branch, though none of the States do actually make such a distinction. Nearly all States constitute every *male* citizen an elector, who is twenty-one years of age. Some States require an additional property qualification; and most of the States also require citizens to be "white." Women have as yet been admitted to suffrage in no State. The question arises here: Is this problem of suffrage one which, *so far as the general government is concerned*, ought properly to be left to the discretion of the States?

We have sufficiently shown that, in the original organization of a commonwealth, *each individual* must openly or tacitly express his agreement to it. This expression is what is called voting. In the original organization each individual is therefore a voter, and if women and children do not vote, and yet remain in the State, they express thereby their agreement to the organization. Whoever does not vote, and yet remains in the State, is considered as having voted in favor of the organization. Each individual is a voter because he has certain inalienable rights, and can only secure them by voting, or by entering a State organization. The Constitution of the United States was thus agreed to originally by every individual inhabitant.

There is also no doubt that the original endorsers of such a constitution can delegate their right to choose government officials to a portion of themselves. Thus, for instance, the President and Senate may be empowered to elect members of the Supreme Court; and if it were considered expedient, it would not be unlawful for the people of a State to empower its House of Representatives to choose the Senators.

But another question is: Whether the original people have the right to delegate away *all* their power to elect government officials, retaining only the power to vote on constitutional amendments, which we have shown must be submitted to *all* the individuals of a State?

The answer to this question settles the famous suffrage question; and the ground of deciding it lies in this consideration: One generation of citizens dies in every commonwealth, and another one arises in its place. This does not happen all at once, but constantly. Each month a number of citizens die, and are replaced by new members. These new members occupy precisely the standpoint which the original citizens occupied before the establishment of the Constitution—they are not yet citizens, but merely candidates for citizenship. For them there exists as yet no State organization, but merely the possibility to enter one. No one can compel them to agree to the form of government which they find ready made for them, and unless they convince themselves that such form of government affords complete security for their inalienable rights, they certainly will not enter it. But such a conviction can only be produced if the possibility is extended to them to change the constitution, and this possibility is given in the *general elections,* in which, for that very reason, each individual has the same right to participate as he has to vote upon the constitution. To exclude him from that right would be to exclude him from all legal relation to other men, and give him the right to make war upon such a commonwealth.

General elections are, therefore, the means whereby the new generation, which is constantly growing up, can become members of a commonwealth, and whereby the constitution—which otherwise would never become operative, since it would be constantly before the new citizens for their vote—can become permanent.

The general government cannot leave it, therefore, to the several States to determine the qualification of electors; nor can itself prescribe any qualification other than that which is necessary to determine at what period the new candidates for citizenship may thus express their desire to become members of the commonwealth. Precisely in the manner in which the principle requires that general elections shall be held, but does not express how often; so it also requires that each new born or immigrated person shall become a member of the commonwealth, but does not express at what time. This fixing of the time of residence, therefore, for both native born and immigrated persons is the only lawful "test" for suffrage. Sex is no disqualification, for it does not physically disqualify—unless, indeed, the monstrous doctrine is upheld that every citizen is liable to military duty; in which case, indeed, women would be disqualified. If women prefer, as is probable in the case of all good women, to let their husbands vote for them, this may be easily arranged. Bad women can be disqualified by criminal law, affixing such punishment to their offence. Poverty does not disqualify, for the poor have the same *rights* as the rich; nor are "tests" of intelligence allowable, since the capacity to read and write does not give more rights to a person than the capacity to play an instrument or to dance a hornpipe. In short, there is no other determination of the right of suffrage lawful than that through *time.*

It is clear that the general government, in determining the age required by it of its native born electors, would not determine it in regard to the electors of the States as State organizations, but would leave each State to fix it for itself as heretofore. For immigrated persons the general government properly determines it also for the several States, by establishing a uniform rule of naturalization.

"The members of the House of Representatives shall be chosen every second year," and "the times, places and manner of holding elections for representatives shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by law make or alter such regulations."

The first provision, providing for elections every two years, seems to guarantee sufficiently a constant control over the Congressional Representatives by the people; and the second provision, required by the additional clause, allowing Congress the power to prescribe the places

and manner of holding elections is necessary for the reason that otherwise a number of States might at any time combine to hold no elections at all, and might thus virtually suspend Congress.

The Senate is the expression of the people of the United States, not as individuals, but as members of the several local governments, or States, which form the whole Union. The principle of this, we might call it geographical representation, is the same which is at the basis of a confederate form of government, and pointed out before, viz., that in each State the population divides unequally—some parts, along the lines of communication, become thickly settled; others, devoted to agricultural purposes, cannot support a crowded population. It is possible that one large city might thus overbalance all the rest of a State in the Legislature, if representation were equally divided according to numbers. To diminish this danger as much as possible, various expedients of dividing the ratio of representation so as to correspond with the geographical divisions of nature have been resorted to; but the most effective one seems to be—if the representation for the House of Representatives is established according to the number of inhabitants, to divide the representation for the Senate according to geographical districts or sections. By this arrangement the law has tried, as it were, to cancel the geographical partiality of nature.

"No person shall be a senator who shall not have attained the age of thirty years, and been nine years a citizen of the United State, and who shall not, when elected, be an inhabitant of that State for which he shall be chosen."

The senators are elected by the several Legislatures of the States. Congress may determine the manner of such election, whether in joint session, or by each branch of the Legislature separately—for six years, each State choosing two senators. Vacancies are filled by the Executive of the State until the next meeting of the Legislature. Whether this mode of electing the senators through the Legislature instead of directly through the people is expedient or not is doubtful. There seems to be less chance of political intriguing in a general election than in an election by the Legislature. The term of service of senators, six years, seems not too long, considering the greater responsibility which attaches to the more permanent body in legislation.

Each branch of the Congress has, in some peculiarity, exclusive rights. Thus, the House of Representatives has the sole right to originate bills for raising revenue, whereas the Senate has the equally important right of confirming treaties concluded by the President, which treaties become the "supreme law" of the land. The House of Representatives has the sole power of impeachment; the Senate the sole power to *try* impeachments.

XI.

The executive power of the general government is vested in a President, who holds his office during the term of four years, and who is chosen, together with the Vice-President for the same term, by the people; not, however, like the members of the House of Representatives, directly, but indirectly, through the medium of electors, as follows:

Each State appoints, in such manner as the Legislature may direct, a number of electors, equal to the whole number of senators and representatives to which the State may be entitled in Congress.

In fixing the number of electors—not according to the number of representatives alone to which each State is entitled in Congress, and which would give to all the people of the United States an equal *numerical* representation in the Electoral College, but according to the number of representatives and senators together—the Constitution has united numerical and geographical representation in the Electoral College in a peculiar manner. It is difficult to understand the expediency of this arrangement, which seems more to have been an arbitrary yielding to the pride of the small States than the result of a principle. The qualifications of voters

for these electors, in such States as may determine to have them elected in a general election, each such State has the power to fix at its pleasure, as the Constitution offers no restrictions. Any State may also provide that they shall be elected by the Legislature, or appointed by the Governor.

Originally it was the intention to have the States appoint electors, who should come together untrammelled, and select the President. The people were not themselves to express their preference for President, but to trust the whole matter to the wisdom of the electors. These electors, moreover, were not to vote for one person as President and another one as Vice-President, but simply to cast their votes for "two persons"—the person having the greatest number of votes, of a majority of the whole number of electors, to be President.

This original mode of electing the executive of the general government seems far preferable to the present mode of having him elected by electors, who are instructed how to vote, and dare not vote differently. If the choice simply of the best men of the people, and not of the people themselves, the President will not dare to assume himself to be the "elect" of the whole people, and try to override the authority of Congress on that plea. To elect the Executive directly through the people seems a dangerous proceeding so long as the Executive retains the extensive powers conferred in the Constitution. To have him elected by Congress, and for a short period, as some would propose, and as is the case in Switzerland, would render the Executive completely dependent upon Congress, and would give constantly rise to political intrigues. To have the Executive elected in the mode established at present is absurd. A return to the original mode, if possible, would therefore be a benefit to the republic not easily to be overrated, particularly in view of the present tendency on the part of each branch of government to consider itself the most legitimate expression of the will of the people. The Constitution alone is the true will of the people.

Whether the Executive ought to be re-eligible, is a difficult question to settle. Under the old mode of electing the President, it might be safely granted, since that mode affords less chance for intrigues; but under the present system it is calculated to induce improper measures on the part of the President, whose term of office expires, to maintain himself in office.

"The President shall be commander-in-chief of the army and navy of the United States, and of the militia of the several States, when called into the actual service of the United States."

Important as this power is, it is not well to be placed in other hands, for the reason that a commander-in-chief appointed by Congress and not responsible to Congress except as a military officer, might undertake to disregard the instructions of Congress; whereas the President, responsible to and connected with Congress, not only in his military capacity, but also politically, would not dare to dream of such a usurpation. Nevertheless, it were well to consider whether additional restrictions are not required.

"The President has power to grant reprieves and pardons for offences against the United States, except in cases of impeachment"—impeachments not being in the nature of trials, and hence not subjecting, in truth, to punishment which the pardon might remove.

He has also power "on extraordinary occasions to convene both houses of Congress, or either of them; and in case of disagreement between them with respect to adjournment, to adjourn them to such time as he shall think proper; to receive ambassadors and other public ministers, and to take care that the laws be faithfully executed."

"He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the senators present concur."

The question whether the House of Representatives has the right to annul treaties, which the Constitution gives the President and the Senate the power to conclude, by refusing to make appropriations

for them, has often been discussed. Washington thought (in 1796) that the House had no such right, but was bound to make every appropriation stipulated in a treaty. The question is all the more important, as it would be useless to impeach the President for concluding a treaty deemed injurious to the country, since his judges, the Senate, would necessarily be—at least two-thirds of them—accomplices.

Bills which have passed both houses of Congress may be returned by the President to the house which originated them, with his objections. This important veto power which the President wields is limited, however, to some extent, by the provision that such vetoed bills shall be reconsidered by each house, and shall become a law when passed by a two-thirds majority of each house. Nevertheless, it is a powerful weapon against the legislative body, and the unlimited authority to exercise it seems both useless and dangerous to the public welfare. It certainly is not proper that the President should have the power to veto any bill which may not please his fancy. The power is evidently granted chiefly for the purpose of preventing Congress from passing unconstitutional measures, or as a check upon the legislative body before the judiciary can decide the disputed question in the final instance.

A still more dangerous power to entrust to the Executive, is the power to appoint, with the consent of the Senate, all public ministers and consuls, judges of the Supreme Court, and all other officers of the United States whose appointments are not provided for in the Constitution. It is true, the people need not elect every government officer directly, but neither is it advisable to delegate to one man the right to choose a vast number of such officers.

There can be no doubt that the powers of the Executive ought to be considerably curtailed, and the mode of his election utterly changed. Until this is done, we shall not have harmony in our government. The President should be both more independent and less powerful than he now is. Above all, it should be understood that he is not like the judiciary, an *a priori* necessary part in the machinery of government.

XII.

The judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges of these courts are appointed by the President, with the consent of the Senate, and hold their office during good behavior.

Being the weakest of all three branches of government, the judicial power has necessarily been rendered the externally most independent. The judiciary having no power and no will, it deserves to be particularly protected in its position. It can do no harm, either to the legislature or to the executive; all it can do is to declare that wrong has been done. To make such a declaration, without having the power to make it valid, requires courage, patriotism, and zeal for the supremacy of law. The judiciary cannot be made too independent in a government. People have spoken of judicial despotism, when the Supreme Court has declared measures of Congress unconstitutional, but such talk is ridiculous. The judicial power is the best of all guarantees of public freedom. There is no possibility that it can ever become tyrannical; at the very utmost, it may retard necessary changes in the form of government. It can only be negative, but never can positively violate the law. Hence it needs no check, and completes the division of powers as the final one. The people should, therefore, above all things, protect their judiciary. It is very wrong to suppose that the legislative body alone is the true expression of the will of the people. The will of the people is expressed only in the Government as a *whole*, but is, above all things, laid down in the written words of the Constitution. To protect this *known* will of the people against the possible violations of the legislative body, is one of the most sacred duties of the judiciary, and constitutes it the supreme defender of the liberties of the people. Congress is surely in the wrong when it states an unconstitutional measure to be the will of the people. If the people had really the will to change the Constitution, they would do it.

"The judicial power extends to all cases in law and equity arising under the Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizens of another State; between citizens of different States; between citizens of the same State, claiming lands under grants of different States; and between a State, or the citizens thereof, and foreign States, citizens or subjects."

That the judicial power of the General Government should have original and exclusive jurisdiction over all cases arising under the Constitution and laws of that government, and over all cases arising with foreign citizens or States, seems self-evident; and it seems equally rational that it should have only appellate jurisdiction in all other cases mentioned in the above clause. But art. 9 of the amendments to that Constitution says, however:

"The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State."

By virtue of this amendment, the judicial power of the General Government has no jurisdiction in cases in which a citizen of one State, or a foreigner, is the plaintiff, and such State the defendant; nor has it even *exclusive* jurisdiction if such State be plaintiff. Why the State courts, in such cases, should supersede the courts of the General Government, seems difficult to understand. It would appear as if the United States courts ought to have final jurisdiction in all cases, except those which arise between citizens of the same State under its own laws.

Congress has the power to constitute tribunals inferior to the Supreme Court; and, in accordance with this power, Congress has divided the whole United States into nine circuits, in each of which circuits the United States Circuit Court assembles twice a year, one of the Supreme Court judges presiding, together with the Circuit Court judge. Congress has likewise divided the United States into thirty-five districts, for each of which the President has appointed, with the consent of the Senate, a District Judge. The District Courts dispose of the minor cases. A separate judicial organization has likewise been established for the Territories of the United States.

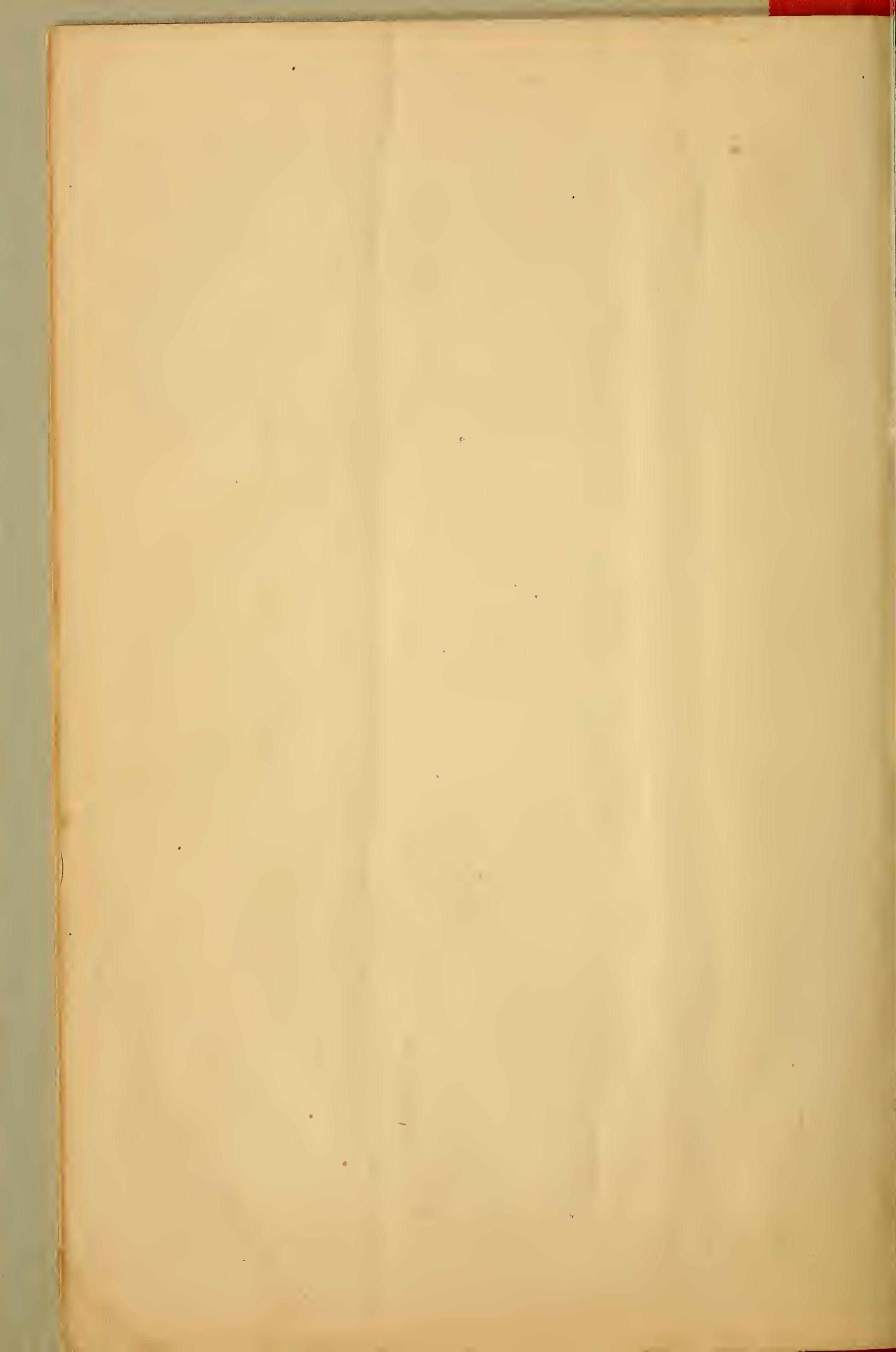
The executive power of the General Government is operative at all times; the judicial power at different periods, in different sections of the country; but the highest court, the Supreme Court, must assemble at least once a year. The legislative power is required to assemble at least once a year, and the duration of its sessions depends altogether upon its own will.

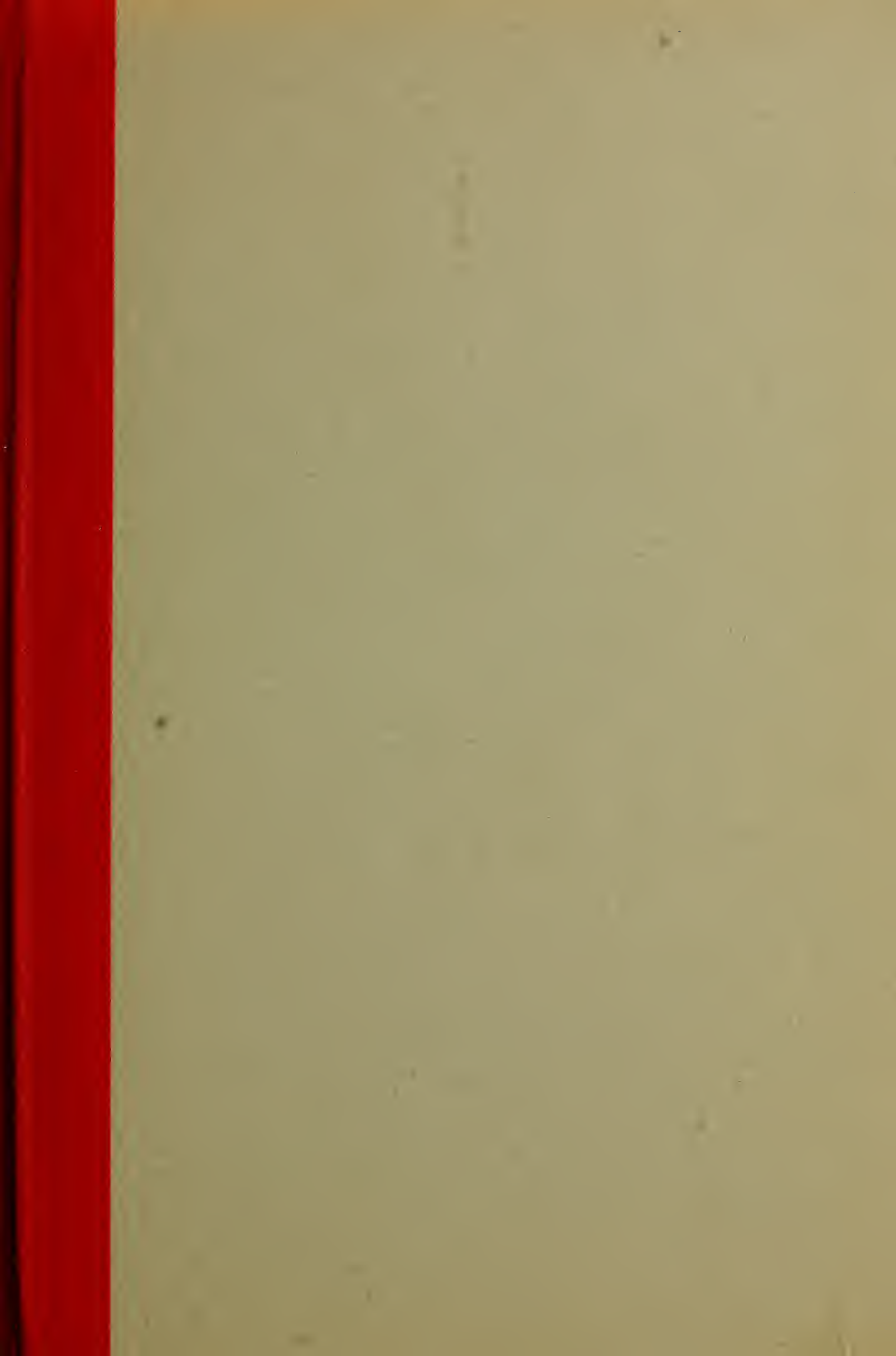
XIII.

It is not to be denied that, of late years, doubts have arisen among a number of our so-called intelligent public men, respecting the practicability of republican institutions. Happily, the "common people"—the so-called ignorant classes—exhibiting therein far higher intelligence and statesmanship,—have not yet learned to share these doubts. We have shown that republican institutions—comprising certain general elections, a written constitution, a confederacy of States, and a judiciary independent of the legislative department—form the only rational and legal form of government. If, therefore, the doubts alluded to have any justification in facts, the legitimate conclusion is not that a republican form of government is a failure, (for reason could not require what is not to be maintained,) but rather that its form has not yet been thoroughly perfected. Instead, therefore, of going back to history for the suggestion of measures to help us in our difficulties, or of casting longing eyes upon a despotic form of government, in the hope that it may kill off the wrongs of partial anarchy, we should rather fall back upon our own invention and artistic skill, and try to discover new improvements

in the wonderful piece of machinery handed down to us by our forefathers. It has been already suggested, in the course of this investigation, where such improvements are necessary, or might be of advantage. A change in the manner of electing the President, particularly, would be one of the most beneficial reforms that could be extended to our country.

It must always be recollected that the greatest number of complaints about the insufficiency of republican institutions arise among the inhabitants of large cities, and that for this reason it will be one of the most important problems for the future statesmen to invent a republican machinery for municipal governments, which shall stop the cause of those complaints. In so far, however, as the grounds of these complaints is to be discovered in the apathy evinced by a large number of citizens for political action, no cure can or should be invented. When our citizens shall have become so corrupt that they will rather risk the fate of republican institutions than rouse themselves to political action, it will be time for our institutions to make way for anarchy and subsequent despotism.





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